>>> George & Judy Mullison <jgmullison@sbcglobal.net> 10/31/2006 2:57:27 PM >>>

Re: ADM File No. 2005-19
(Proposed Amendment of Rules 2.512, 2.513, 2.514, 2.515, 2.516, and
6.414 of the Michigan Court rules)

To Whom It May Concern:

I am very opposed to several of the proposed changes. I believe that they would drastically affect the impartiality and fairness of jury trial proceedings, without "fixing" any appreciable problem that needs to be taken care of. In addition some raise practical as well as financial problems.

(What the exact problem is that is attempted to be fixed by some of these changes is not stated. However, I have been in practice for about 38 years both as a prosecutor and a defense attorney (limited civil trial experience) and I don't know of any problem which can be fixed by the changes mentioned below, without causing worse problems. Please remember that there are often unintended consequences to changes. This is of particular importance in relation to major institutional structures such as the Justice System, and in particular jury trials, which have such important due process considerations for everyone. Thus, changes to procedures which have been satisfactory, and which have been in effect for decades, should be made cautiously and sparingly.)

Proposed Changes to MCR 2.513 (K)-Allowing Juror Discussion during Trial

I think that this is one of the worst proposed changes, from a fairness prospective. It just ignores human psychology.

The instruction to the jurors not to discuss the case with anyone until told to do so at the end of the trial is extremely important when considering our human psychological makeup. Once any person makes up their mind, (even tentatively), it is harder to get that person to change his or her mind than it would have been without the prior decision. (I don't think that anyone would disagree this statement.) To let jurors discuss a case before its conclusion would mean that it would be much harder as a practical matter to be fair to a defendant (either civil or criminal). The reason is obvious. The people (or plaintiff) go first and put on its evidence. If jurors discuss the case they are limited to what they have heard which is basically one sided, except for perhaps some questions raised through cross-examination. They will then be considering the case without all the evidence and instructions. Thus the jurors will tend to have their mind made up before the defense even starts, and the tentative decision will almost always be in favor of the plaintiff.

I can hear someone saying: "but the juror may just do that himself or herself anyway." That is certainly true. But many will try to keep their minds open. However, that brings in other psychological factors. The first is that people don't like to be wrong. Therefore, once they make up their mind they will argue with others to try to persuade them. Thus, there will be juror deliberation without all of the facts and legal instructions. (This additional discussion will tend to harden people in their belief.) Second, once a person makes up their mind they will look for points to bolster their point of view. Thus the tendency will be to seize on and remember evidence which supports their position, and ignore evidence pointing the other way. All of this leads to a less fair consideration of the evidence than will be taken using the present system.

The rule as it is, is based on very human characteristics, tries to give both plaintiff and defendant a fair shake at an impartial jury deliberation.

Proposed Changes to MCR 2.513 (M)-Allowing Judges to Comment on Evidence

I think that this is going to cause a lot of practical problems, as well as being very unfair. The judge should not be "summing up the evidence" or "commenting on the weight of the evidence!!"

First, judges are human. There is no way that they will not form opinions as to what the result "should" be during the trial. They will inevitably have opinions as to whom they believe, how important certain pieces of evidence are, etc.. It would be impossible for this not to happen. Then of course the problem is how to "fairly and impartially" sum up the evidence or its weight. I submit this is just impossible to do. We all show our opinions by our choice of words. The English Language contains a very large number of words, each, carrying both connotations and denotations. It is sophisticated and contains many subtleties. There is no way that any judge can really "fairly and impartially" sum up the evidence and its weight without having a large effect on the jury depending on the words used. It is just impossible for a judge to do this without some of his thinking creeping in. This is very unfair.

Second, consider the appellate process. It is going to be very difficult to try to determine whether this use of a particular word or phrase is "fair and impartial." Then the cumulative effect of a number of allegations of error will also be involved. It will take a long time to decide whether the words used are fair and impartial.

Third, there is the problem that judges may not hear or remember an important piece of evidence. If that is left out of the summary this can cause a critical problem, and in fact cause a retrial, when none would otherwise be needed.

Fourth, our system leaves the jurors to determine the facts. Why are they somehow incapable of remembering evidence and determining its weight on their own?

Such a commenting process will inevitably be unfair to one side or the other. What problem are we trying to fix anyway? If jurors aren't to be trusted, then the answer is to eliminate the jury trials and leave such decisions to the judge. To badly paraphrase others-this (jury trial) system may not be terribly good but it is better than all the others. I fully agree with that sentiment.

Proposed changes in MCR 2.513(D)-Interim Commentary

I don't know what problem this is supposed to solve, but I think that it is a very bad idea. When such comments may be made is not specified. What the comments can consist of is not specified, Whether or not opposing comments are to be allowed at the same time is not specified. How long these comments can go on is not specified.

In addition, how is it fair if a prosecutor or plaintiff comments on a piece of evidence which the defense will oppose later. Then the jury hears an argument without knowing all of the evidence, which means if may have undue weight or be out of context.

What if the "answer" to a comment depends on evidence which will be introduced later?

All of these comments will then be subject to appeal, as well as the judge's refusal to allow a comment. What a circus this could be!

I think that all of these comments will be treated as mini closing arguments and need to be answered, and if unanswered will be grossly unfair and violate due process. How does this procedure advance good decision-making or a fair process? It does not, and just will create many more problems than whatever it is trying to solve.

Proposed changes in MCR 2.513 (E)-Reference Documents

There is quite a lack of specificity in what the limits are as to these "books" contents. This proposal invites due process problems, and there are practical problems as well. The court must know that parties will try to include many materials meant to persuade or convince of a point of view. All of this is a very basic change in the trial system.

I don't believe that having statutes in the book will be helpful or fair. Many statutes have specific interpretations involved, and words sometimes have specific legal definitions. Also, jurors are not trained in interpreting statutes. This will cause many unfair interpretation problems. The judge's instructions should cover much of what is behind this suggestion. There the elements of offense (or what plaintiff's have to prove) are contained as well as specific applicable definitions etc.. Giving jurors the statutes and then allowing such use will create many problems.

There will now have to be three "books" the plaintiff's, the defendant's, and the judges jury instructions. This will create confusion and distraction while jurors examine the books in the courtroom.

The creation of such books will result in unfairness. It is expensive to give materials to jurors. More well-to-do parties can afford to pay for color printing, actual "books," or special binders, which will visually enhance the materials, which will be without regard to their basic worth. Poorer parties will be at a disadvantage in this "game." Big law firms will be able to update these materials during a trial while a small firm, or a sole practioner will not be able to do so. This is unfair.

There is also the practical time problem when considering cases. Defense attorneys, particularly for indigents criminal defendants, will be at a particular disadvantage since pay is notoriously low and counties keep expenses down by cutting indigent fees and limiting costs. An indigent defendant would be particularly at a disadvantage for paying for nicer presentation materials, and even having his attorney be paid for the time involved in their preparation. Compensation for attorney time is also a problem for the poorer civil plaintiff or defendant.

Proposed changes in MCR 2.513(F)-Deposition Summaries

I think that this rule should include a provision that a summary cannot be used unless all parties agree. Summaries are time consuming to make, and are likely to be slanted one way or another, depending one the language used and what is left out. A deposition is supposed to be in place of a witness testifying. Other witness testimony is not "summarized" and then presented to the jury, and these should not be either unless there is agreement.

Proposed changes in MCR 2.513 (G)(1) and (3)-Scheduling Expert Testimony

I have a number of objections to this proposal.

First, is the practical problem of scheduling experts to be present at the same time. This will often be very difficult or even impossible, to do.

Second, there is the related practical problem of witness availability in general. Depositions of experts are the norm. What would this do to the whole practice of taking depositions of experts?

Third, how will this help the situation? At present there is an orderly presentation of witnesses, as logical as the party can make it. A joint or sequential appearance will mean that logical progression will be lost, for at least one party.

Fourth, how will MRE 703 be complied with? This requires facts on which an opinion is based to be in evidence prior to expert testimony. The defense will not have that opportunity if the experts are scheduled during the plaintiff's case. The plaintiff will not have completed his case if his expert is called during the defense presentation. (Also then what of directed verdict motions.)

Fifth, if a panel discussion is involved then it is impossible to be properly prepared. Experts may say things on the spur of the moment and then there will be no time to "fact check," or to be prepared with counter experts or literature in the field. (The party's expert may not be prepared for a discussion on some other point.) In addition this puts a premium on an expert being a good debater or "fast on his feet," instead of just being an expert in the field. This puts a premium on the personality of presentation instead of what is being presented. (Of course there are "good" and "bad" witnesses. But this places an extra dimension on it, not unlike a candidate debate on television.)

I have not taken the time to check the working of every proposal to see if it is just being moved or if it is an addition or change. If there are additional changes, which I presume there are, I think that the court should put out one or two proposals at a time so there can be adequate discussion, instead of a large number of changes being made all at once such as this proposal.

If you need any further information please let me know.

Sincerely yours,

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